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ARTICLES

SECESSIONS FROM EU MEMBER STATES: THE IMPERATIVE OF UNION'S NEUTRALITY

DIMITRY KOCHENOV* AND MARTIJN VAN DEN BRINK**

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ABSTRACT: We argue that EU law and the *ethos* of European integration, premised on inclusiveness and the taming of the State requires the Union to remain neutral in the context of the permutations of statehood at the national level leading to the emergence of the new State entities in Europe. We show that the matter of permutations of statehood is not new or exceptional, unlike what is sometimes claimed, and demonstrate that the EU is not to blame for facilitating the viability of newly-emerging States in Europe, since this is one of the natural bi-products of the very nature of the Union. In this context intervening into national constitutional secession politics and making threats to prevent the newly-emerging States from joining the EU would not only be an *ultra vires* action for the EU to take. It will also be both counter-productive and deprived of any purpose, which leads us to conclude that EU law should be deployed as inventively as will be necessary to ensure continued membership in the EU of the entities seceding from the current Member States.

KEYWORDS: secessions – EU integration – EU membership – accession – *ethos* EU.

I. INTRODUCTION

This article argues that there are no legal grounds for the European Union (EU) to take sides in the context of the internal processes within the Member States potentially leading to their territorial reconfiguration and even eventual secessions of their parts, re-

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sulting in the articulation of new statehood on the European continent.¹ When confronted with the demands of either the Member States' governments or the secessionist regions to support their cause, EU's neutral position (presuming that the process of the territorial reframing of statehood is taking place in a non-violent fashion and in full conformity with the law)² is crucial for the success of democracy and the rule of law in the context of the strict observance of the principle of good neighbourly relations in Europe.³ Importantly, such neutrality necessarily implies assisting both parties (while acting strictly within the sphere of competences of the Union, of course) to come as close as possible to the attainment of the Union objectives of peace, prosperity and democratic development embodied in the values, which the EU together with its Member States draws upon.⁴ It goes without saying that such assistance can take a variety of different forms, ranging from possible necessary accommodation of the special needs of a particular region in the process of devolution (which has traditionally been the case with the EU's Overseas, for instance,⁵ where such accommodation is elevated to the

¹ For analyses of the legal mechanics of secessions under international law, see, e.g., C. WALTER, A. VON UNGERN-STERNBERG, K. ABUSHOV (eds), *Self-Determination and Secession in International Law*, Oxford: Oxford University Press, 2014; A. TANCREDI, *La secessione nel diritto internazionale*, Padova: CEDAM, 2001. See also: Supreme Court of Canada, *Reference re Secession of Quebec*, opinion of 20 August 1998, paras 103-104. For a thoughtful analysis of this case see: S. CHOUDRY, R. HOWSE, *Constitutional Theory and the Quebec Secession Reference*, in *Canadian Journal of Law and Jurisprudence*, 2000, p. 143 *et seq.* For an overview of the thorny issues surrounding secessions in the EU context, see, e.g., S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, in *University of Oxford Legal Research Paper Series*, 2014; C. CLOSA (ed.), *Troubled Membership: Dealing with Secession from a Member State and Withdrawal from the EU*, in *EUJ Working Paper*, 2014/91; D. KENEALY, S. MACLENNAN, *Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?*, in *European Law Journal*, 2014, p. 591 *et seq.*; N. MACCORMICK, *Is there a Constitutional Path to Scottish Independence?*, in *Parliamentary Affairs*, 2000, p. 721 *et seq.*; D. EDWARD, *EU Law and the Separation of Member States*, in *Fordham International Law Journal*, 2013, p. 1151 *et seq.*; N. WALKER, *Beyond Secession? Law in the Framing of the National Polity*, in *University of Edinburgh Europa Working Paper*, 2014/11.

² Such as was the process of the Scottish secessionist referendum, for instance. The Edinburgh agreement, signed by the Scottish and United Kingdom (UK) government, on the referendum concerning Scottish independence provides proof of this. The text of the Agreement is available at www.gov.scot. See also: M. KEATING, *Scotland and the EU: Comment by MICHAEL KEATING*, in *Verfassungsblog*, 9 September 2014, www.verfassungsblog.de.

³ On the latter, see E. BASHESKA, *The Good Neighbourliness Principle in EU Law*, PhD Thesis 2014; see also E. BASHESKA, *The Position of the Good Neighbourliness Principle in International and EU Law*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, Leiden-Boston: Brill-Nijhoff, 2015.

⁴ As reflected in Art. 2 of the Treaty on European Union (TEU), among other instruments. On the legal nature of this provision, see, C. HILLION, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge: Cambridge University Press, 2016, forthcoming.

⁵ Importantly, such accommodation in the context of the Overseas happens both *vis-à-vis* the regions within the ambit of the *acquis* (so-called Outermost Regions) and the territories under the sovereignty of the Member States where the principle of the application of the *acquis* in full does not apply (so-

rank of a principle of law)⁶ to providing newly-minted polities with full wholehearted assistance in joining the Union, should they so desire.⁷

Taking sides in the national secession/territorial rearrangement debates by preventing and/or fostering (either directly or indirectly) particular outcomes in the context of the national constitutional rearrangements, is simply not among EU's constitutional prerogatives: intervening into the resolution of these issues, thus shaping the Member States with no regard to their internal constitutional process, is not merely *ultra vires* action: it amounts to tyranny. Evidently, neutrality is, bearing in mind the political salience of secessions, a matter of perspective, which will be perceived differently by the opponents and advocates of separation. To claim, however, that it would be "extremely difficult if not impossible"⁸ for a seceded territory to join the EU clearly violates the imperatives of neutrality. Taking into account the palpable impact of the EU's reactions on voting behavior in secession referendums,⁹ the EU should shy away from getting involved in the national debate, but, instead, let it run its due course and respect the democratic process' outcome.

As is clear by now, this article embodies a principled disagreement with the dominant position on the issue of secessions, espoused, *inter alia*, by Joseph Weiler,¹⁰ but

called Associated Countries and Territories). For an overview, see, e.g., D. KOCHENOV, *The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon*, in *Michigan State International Law Review*, 2012, p. 669 *et seq.* (and the literature cited therein).

⁶ The principle of accommodation is enshrined in the Treaties through Arts 52, para. 2, TEU, 349, 355 TFEU. See also K. MÜLLER, 'Concentric Circles' of the Periphery of the European Union, in *Australian Journal of Politics & History*, 2002, p. 322 *et seq.* Dock dues are, among numerous others, a great example of such accommodations: M. SLOTBOOM, *L'application du Traité CE au commerce intraétatique? Le cas de l'octroi de mer*, in *Cahiers de Droit Européen*, 1996, p. 9 *et seq.* See also P. PUISOCHET, *Aux confins de la Communauté européenne: les régions ultrapériphériques*, in G.C. RODRÍGUEZ IGLESIAS *et al.* (eds), *Mélanges en hommage à Fernand Schockweiler*, Baden-Baden: Nomos, 1999, p. 491 *et seq.*, pp. 504–506. For a good summary of the development of the *octroi de mer* case-law of the Court of Justice (CJEU) see also Court of Justice, judgment of 7 November 1996, case C-126/94, *Société Cadi Surgelés, Société Sofrigo, Société Sofroi and Société Sofriber v. Ministre des Finances and Directeur général des douanes*. See also judgment of 12 February 1992, case C-260/90, *Leplat*. On the derogations more generally, see, e.g. D. KOCHENOV, *De praktische toepassing van Artikel 299 als grondgebied voor derogaties*, in H.E. BRÖRING *et al.* (eds), *Schurende rechtsordes: Over juridische implicaties van de UPG-status voor de eilandgebieden van de Nederlandse Antillen en Aruba*, Groningen: Europa Law Publishing, 2008.

⁷ For a lucid analysis of the rules on joining the EU, see, S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit., p. 6.

⁸ These were Barroso's much criticised comments on the Scottish secession debate, available at news.bbc.co.uk. For a critique: N. WALKER, *Hijacking the Debate*, in *Blog of the UK Constitutional Law Association*, 18 February 2014, www.ukconstitutionallaw.org.

⁹ N. WALKER, *Beyond Secession? Law in the Framing of the National Polity*, cit., footnote 13 and accompanying text.

¹⁰ J.H.H. WEILER, *Scotland and the EU: A Comment by JOSEPH H.H. WEILER*, in *Verfassungsblog*, 10 September 2014, www.verfassungsblog.de. His view on Catalonia is very similar. J.H.H. WEILER, *Catalonian*

also finding support with the EU institutions,¹¹ that the EU should prevent secessionist claims at the national level from succeeding through an effective politics of blocking the processes of successfully-formed new States' inclusion into the Union, thereby making secessions unattractive and guaranteeing a stable number of Member States through what we see as an indirect coercive intervention with the constitutional politics at the national level. The demands that the Union stay out of the heated political battles around such thorny issues seem to be most justified. The goal of the article is to explain, clarify and defend this position.

We proceed in four steps. Firstly, we draw on a number of historical examples in Europe and elsewhere to demonstrate beyond any doubt how common the mutations of statehood are, secessions included. Indeed, (much) more than half of what used to be the founding Member States' territory has left their sovereignty since the creation of the European Communities.¹² Moreover, a significant number of the Member States of

Independence and the European Union, in *Blog of the European Journal of International Law*, 20 December 2012, www.ejiltalk.org.

¹¹ Barroso's comments on the Scottish secession debate, cit. Later, Juncker, Barroso's successor, toned down those claims: www.scotsman.com. However, Juncker, then still in his capacity as leader of the European People's Party (EPP), has made similar remarks as Barroso with respect to the independence movement in Catalonia, saying that "[t]hose who believe that Europe would accept an independent Catalonia, are fundamentally wrong". For the interview in Spanish see *Juncker: "Una Cataluña independiente no sería aceptada en Europa"*, in *abc.es*, 28 April 2014, www.abc.es. The Commission letters recently sent in response Santiago Fisas' (Member of the European Parliament of the Popular Party) question, asking whether the Commission would recognise an independent Catalan State created by a declaration that would not respect the Spanish constitution also demonstrates the EU's ambivalence in this situation. While the English version states that "[i]t is not for the Commission to express a position on questions of internal organisation related to the constitutional arrangements of a particular Member State", the Spanish version adds another nine sentences, which, when translated, read as follows: "The Commission recalls in this context that, in accordance with the provisions of Article 4, paragraph 2, TEU, the Union must respect the 'national identities [of Member States], inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the state'. A Member State's territory is determined only by national constitutional law, and not by the decision of an automatic parliament contrary to the constitution of that state". The letters are available at www.euobserver.com 24 September 2015, "*Juncker's answer on Catalonia grew in translation*". The Catalan situation is different, of course, from the Scottish due to the unconstitutionality of the Catalanian independence claims: R. RINCÓN, *El Constitucional anula la declaración soberanista por unanimidad*, in *El País*, 2 December 2015, www.politica.elpais.com.

¹² Besides of course Algeria which was fully incorporated into the French Republic at the inception of the Communities and the Netherlands East Indies and New Guinea, the Member States possessed a variety of territories around the world and it was not the intention of the Communities to let these territories go. Indeed, their incorporation into the internal market in the mid - to long-term future was a crucial condition for the French participation in the European integration project: D. CUSTOS, *Implications of the European Integration for the Overseas*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, Alphen aan den Rijn: Kluwer Law International, 2011, p. 91 *et seq.* Following Ziller's helpful compilation, the Member States' territories then included: the Belgian territories of Congo and Rwanda-Burundi, Italian protectorate of

the EU are direct products of recent permutations of statehood, some of them gaining statehood with the clear support of the Union.¹³ The same applies to some candidate countries.¹⁴ To say that secessions are somewhat extraordinary would thus be a serious and unhelpful misrepresentation of reality. They are a day-to-day part of the life of the international community¹⁵ (Section I). Having thus set the ground for the discussion and dismissed the false exceptionalism of secessions, the article moves on by explaining the importance of the principle of democracy as a foundational value for the EU, as well as its limits. It is suggested that those, who believe the EU should not embrace seceded territories do not take the principle of democracy sufficiently seriously (Section III). If a seceded State desires to join the EU, the need to accommodate the people's will is not premised only upon the EU's foundational values, but also follows from the EU's historic *ethos* of openness to new members¹⁶ (Section IV). What is required, therefore, in the case of legally and constitutionally sound secessions is that the EU employ all the legal and political tools at its disposal to prevent a (temporary) termination of the enjoyment of rights stemming from the seceding territory's membership of the EU as part of the Member State it is about to leave, would the people of the newly emerged State express the will to remain part of the EU. In full agreement with Sionaidh Douglas-Scott's crisp argument,¹⁷ we believe that a large number of legal-political tools at the disposal of the Union, coupled with good will of all the actors involved makes it legally possible to en-

Somalia, to the Netherlands New Guinea, and to the French equatorial Africa (Côte-d'Ivoire, Dahomey, Guinea, Mauritania, Niger, Senegal, Sudan, and Upper Volta), French East Africa (Moyen-Congo (the future Central African Empire beloved by Giscard d'Estaing), Gabon, Oubangui-Chari and Chad), protectorates Togo and Cameroon, Comoros Islands (Mayotte, separated from them is now an outermost region of the EU), Madagascar, Côte Française des Somalis. Following the UK accession, the list of the associated countries and territories became much longer, including (besides the countries and territories still on the list) Bahamas, Brunei, Caribbean Colonies and Associated States (Antigua, Dominica, Grenada, St. Kitts and Nevis, St. Lucia, St. Vincent and Anguilla, British Honduras), Gilbert and Ellis Islands, Line Islands, the Anglo-French Condominium of the New Hebrides, Solomon Islands, and Seychelles. J. ZILLER, *L'Union européenne et l'outre-mer*, in *Pouvoirs*, 2005, p. 145 *et seq.*, pp. 146-147.

¹³ Which is attested, for instance, by the work of the Badinter Commission: F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, in M. CREMONA (ed.), *Developments in EU External Relations Law*, Oxford: Oxford University Press, 2008, p. 37 *et seq.*

¹⁴ In one example, it was due to the EU's efforts that a deal laying down the rules concerning the rules of the Montenegrin independence referendum was brokered between the pro- and anti-independence movements. Following EU recommendations, it was decided that for independence to be gained, a 55 per cent majority was required. For a detailed analysis of the negotiations see: K. FRIIS, *The Referendum in Montenegro: The EU's Postmodern Diplomacy*, in *European Foreign Affairs Review*, 2007, p. 67.

¹⁵ A. TANCREDI, *La secessione nel diritto internazionale*, cit.

¹⁶ For a seminal early treatment, see P. SOLDATOS, G. VANDERSANDEN, *L'admission dans la CEE – Essai 'interprétation juridique'*, in *Cahiers de Droit Européen*, 1968, p. 674 *et seq.*; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, Alphen aan den Rijn: Kluwer Law International, 2008, chapter 1 (and the literature cited therein).

¹⁷ S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit.

sure that no such termination comes about and all the efforts are taken to ensure continuity (Section V). The conclusion is simple: secessions are ordinary events in international life, which are up to the polities themselves to manage. EU's interventions into this process (no matter whether these are active, or passive in nature) should thus necessarily be frowned upon as uncalled for from the point of view of the principle of democracy as well as the *ethos* of the Union, its value-laden nature considered and, importantly, would lack any legal basis.

II. A WORD ABOUT THE ARTIFICIALITY OF SECESSIONS' EXCEPTIONALISM

Secession from a Member State of the European Union is nothing new. History knows plentiful examples of what has at times erroneously been portrayed as a novel problem. One should only recall the origins of the EU as a Eurafrican Union¹⁸ and look at the contemporary maps: from Vanuatu to Congo, from Somalia and Suriname, European sovereignty has receded, bringing with it exclusion from the internal market¹⁹ and the European Convention of Human Rights.²⁰ Hailing "the development of the African continent" as the "essential task" of Europe,²¹ the Schuman Declaration (Europe's mischievous messianic document)²² clearly belongs to a different era, when decolonization was perceived as an impossibility and European nations' power over the Overseas domin-

¹⁸ P. HANSEN, S. JONSSON, *Building Eurafrica: Reviving Colonialism through European Integration, 1920-60*, in K. NICOLAIDIS, B. SEBE, G. MAAS (eds), *Echoes of Empire: Identity, Memory, and Colonial Legacies*, London: I.B. Tauris, 2015; P. HANSEN, S. JONSSON, *Eurafrica: The Untold History of European Integration and Colonialism*, London: Bloomsbury Academic, 2014; P. HANSEN, S. JONSSON, *Bringing Africa as a "Dowry to Europe": European Integration and the Eurafrican Project*, in *Interventions*, 2011, p. 443 *et seq.*; P. HANSEN, S. JONSSON, *Imperial Origins of European Integration and the Case of Eurafrica: A Reply to Gary Marks' 'Europe and Its Empires'*, in *Journal of Common Market Studies*, 2012, p. 1028 *et seq.*; D. CUSTOS, *Implications of the European Integration for the Overseas*, cit.

¹⁹ All the Cotonou agreements notwithstanding. K. ARTS, *ACP-EU Relations in a New Era: The Cotonou Agreement*, in *Common Market Law Review*, 2003, p. 95 *et seq.*; S. BARTELT, *ACP-EU Development Cooperation at a Crossroads? One Year after the Second Revision of the Cotonou Agreement*, in *European Foreign Affairs Review*, 2012, p. 1 *et seq.*

²⁰ A. HALLO DE WOLF, *The Application of Human Rights Treaties in Overseas Countries and Territories*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, cit. See, however, European Court of Human Rights, judgment of 28 April 2009, no. 11890/05, *Bijelić v. Montenegro and Serbia*, where the Court found that the Convention might be deemed as continuously in force, thereby applying to a seceded entity: an approach unknown in the times of decolonisation.

²¹ The relevant paragraph of the Declaration of 9 May 1950 reads as follows: "With increased resources Europe will be able to pursue the achievement of one of its essential tasks, namely, the development of the African continent". Full text is available at www.robert-schuman.eu.

²² J.H.H. WEILER, *Deciphering the Political and Legal DNA of European Integration: An Exploratory Essay*, in J. DICKSON, P. ELEFTHERIADIS (eds), *Philosophical Foundations of European Union Law*, Oxford: Oxford University Press, 2012, p. 137 *et seq.*

ions was presumed eternal, destined to last.²³ The sovereign territories of the majority of the founding Member States of the Union have shrunk in the most radical fashion.²⁴ The same applies to numerous Member States to have joined later:²⁵ British colonial law was denigrated from one of the key areas of law into the relative obscurity of a mere panopticum of exotic topics.²⁶ The territorial shrinking in question did not only happen due to the elevation to statehood of the colonial possessions²⁷ – these were, in many respects, separate legal entities²⁸ with their own law and nationality²⁹ – but also, at least in one important example, through splitting the Member States proper: Algeria was France.³⁰ Besides, some territories were said to have “left the EU”,³¹ while at the same time formally remaining part of a Member State. While some actually never “joined”,³² others constantly fluctuated (or at least appeared to be fluctuating)³³ be-

²³ P. HANSEN, S. JONSSON, *Building Eurafrica: Reviving Colonialism through European Integration, 1920-60*, cit.; P. HANSEN, S. JONSSON, *Eurafrica: The Untold History of European Integration and Colonialism*, cit.; P. HANSEN, S. JONSSON, *Bringing Africa as a “Dowry to Europe”: European Integration and the Eurafrican Project*, cit.; P. HANSEN, S. JONSSON, *Imperial Origins of European Integration and the Case of Eurafrica: A Reply to Gary Marks’ ‘Europe and Its Empires’*, cit.

²⁴ Germany, of course, is the most radical counter-example: Treaty on the Establishment of German Unity of 31 August 1990, Art. 1; M. BOTHE, *The German Experience to Meet the Challenges of Reunification*, in A.E. KELLERMAN *et al.* (eds), *EU Enlargement: The Constitutional Impact at EU and National Level*, The Hague: Asser Press, 2011, p. 435 *et seq.*; E. GRABITZ, *L’unité allemande et l’intégration européenne*, in *Cahiers de Droit Européen*, 1991, p. 3 *et seq.*; J.-P. JACQUÉ, *L’unification de l’Allemagne et la Communauté européenne*, in *Revue générale de droit international public*, 1990, p. 997 *et seq.*

²⁵ For the Europe-wide take, see, D. KOCHENOV (ed.), *EU Law of the Overseas*, cit.; R. ADLER-NISSEN, U. PRAM GAD (eds), *European Integration and Postcolonial Sovereignty Games: The EU Overseas Countries and Territories*, London: Routledge, 2013.

²⁶ I. HENDRY, S. DICKINSON, *British Overseas Territories Law*, Oxford: Hart Publishing, 2011.

²⁷ Thus, for the first time in history, making statehood the dominant form of the legal-political organisation of the world: P. KJÆR, *Constitutionalism in the Global Realm: A Sociological Approach*, London: Routledge, 2014.

²⁸ See, e.g. the classic treatise on British colonial law by Sir Kenneth Roberts-Wray, outlining these complexities with great clarity: K. ROBERTS-WRAY, *Commonwealth and Colonial Law*, London: Stevens and Stevens, 1966.

²⁹ For an example from the Dutch East Indies law, see, e.g. B. DE HART, *De verwerpelijste van alle gemengde huwelijken. De Gemengde Huwelijken Regeling Nederlands-Indië 1898 en de Rijkswet op het Nederlandschap 1892 vergeleken*, in *Jaarboek voor Vrouwengeschiedenis*, 2001, p. 60 *et seq.*

³⁰ Algeria was fully incorporated first following the formation of the Second Republic (1848). G. PERVILLÉ, *La politique algérienne de la France, de 1830 à 1962*, in *Le Genre humain*, 1997, p. 27 *et seq.*

³¹ Treaty amending, with regard to Greenland, the Treaties establishing the European Communities of 13 March 1984 (The Greenland Treaty); F. WEISS, *Greenland’s Withdrawal from the European Communities*, in *European Law Review*, 1985, p. 173 *et seq.* “Leaving” is not a correct characterisation of this treaty’s key legal effect: Greenland simply changed its status under the Treaties, becoming an Overseas Country or Territory in the sense of Annex II, which means that a lot of EU law applied there.

³² Such examples include, *inter alia*, Macao, Hong Kong (B. HOOK, M. SANTOS NEVES, *The Role of Hong Kong and Macau in China’s Relations with Europe*, in *The China Quarterly*, 2002, p. 108 *et seq.*), Faroe Islands (Art. 355, para. 5, lett. a), TFEU), Suriname (which decided not to join the Communities when the

tween *in* and *out*.³⁴ Some opted to stay in, the decolonization drive notwithstanding.³⁵ The place of global-territorial ambitions and failed imperial narratives in the evolution of the European Union (marked by total scholarly silence for decades) is finally studied in a serious fashion.³⁶

Turning to Europe *proper* (now conceived of geographically, not through its “mission civilisatrice”, as half-hearted, as it was Quichotean), a simple glance at the statehood of the current Member States suffices to make a basic point: mutations of statehood (in different forms that they may take)³⁷ are responsible for the creation / consolidation of a number of the Member States of the EU, from the decolonization context spurring Malta and Cyprus into existence to the regaining of statehood by the Baltic

Netherlands Antilles asked to be included as Overseas Countries or Territories, UK Sovereign Base Areas in Cyprus (SBAs) (Art. 355, para. 5, lett. b), TFEU); S. LAUHLÉ-SHAËLOU, *The Principle of Territorial Exclusion in the EU: SBAs in Cyprus – A Special Case of Sui Generis Territories in the EU*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, cit., p. 153 *et seq.* Some did join at a later stage compared with the ratification of the Treaties by their “mother country”. The examples include the former Netherlands Antilles (Convention to amend the Treaty setting up the European Economic Community with the object of making the special system of Association defined in Part Four of that Treaty applicable to the Netherlands Antilles of 13 November 1962) and Canary Islands (See, Regulation (EEC) No 1911/1991 of the Council on the application of the provisions of Community law to the Canary Islands).

³³ Saint-Pierre-et-Miquelon is the best example: France claimed to have changed the status of the territory unilaterally on a number of occasion. It is not entirely clear whether such unilateral change (which was entirely in line with the Treaty text at the time) actually resulted in a difference in treatment vis-à-vis the Communities. The Commission claimed it did: Written Question No 400/76 by Mr. Lagorce to the Commission concerning the situation of the islands Saint-Pierre-and-Miquelon, para. 1.

³⁴ For a detailed analysis of the case of Saint-Pierre-et-Miquelon, see, D. KOCHENOV, *The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon*, cit., note 321.

³⁵ Mayotte, breaking away from the Comores is a great example, as is Aruba, which was being pushed out of the Kingdom by the Dutch government, but managed to remain part of the Kingdom of the Netherlands. See, on Mayotte, H. BÉRINGER, *Départementalisation de Mayotte: Un changement de régime statutaire aux enjeux internationaux*, in *Revue Juridique et Politique*, 2010, p. 176 *et seq.*; H. BÉRINGER, *La question de Mayotte devant le Parlement français*, in O. GOHIN P. MAURICE (eds), Paris: L.G.D.J., 1996, p. 199 *et seq.* On Aruba, see, D. KOCHENOV, *Le droit européen et le fédéralisme néerlandais: Une dynamique en évolution progressive*, in J.-Y. FABERON, V. FAYAUD, J.-M. REGNAULT (eds), *Destins des collectivités politique d'Océanie*, Marseille: Presses Universitaires d'Aix-Marseille, 2012.

³⁶ K. NICOLAIDIS, B. SEBE, G. MAAS (eds), *Echoes of Empire: Identity, Memory, and Colonial Legacies*, London: I.B. Tauris, 2015. The EU, for some, is an Empire too, and the arguments supporting this claim are worthy of a serious consideration: J. ZIELONKA, *Europe as Empire: The Nature of the Enlarged European Union*, Oxford: Oxford University Press, 2007.

³⁷ These could amount to the denunciation of pre-existing founding treaties forming union states; the emergence of dual statehood under pressure from the winning powers in the post-war context; restoration of independence lost at a certain point in the past, and so forth. What is relevant for us here is the general dynamic nature of statehood's mutation and (re)emergence, which is certainly observable in the contemporary context.

States,³⁸ the split between the Czech and the Slovak Republics,³⁹ and the articulation of Slovenia and Croatia, as well as the united Germany, following the incorporation of the German Democratic Republic (DDR) and Berlin (West) into the Federal Republic,⁴⁰ and France, with Algeria leaving.⁴¹ Some of these sovereignties are fictitious: Cyprus does not control a good half of its territory, with one of the most important borders in Europe being branded a "green line";⁴² Algeria was only excluded from the Treaties with the Maastricht revision – many years (and many chances to adjust the text to reality) following independence in 1962. Crucially, the EU, as well as its individual Member States, played an important role in bringing about such mutations of statehood not only with regard to the entities which came to be Member States,⁴³ but also other countries, including loose protectorates that the EU has created.⁴⁴

All in all, thus, two important lessons from the above emerge. Firstly, mutations of statehood are not exceptional. To present them as rare would be a mistake, in the "historical time" at least. A large number of Member States spent the longest share of their "life" (especially in their contemporary borders and humbler, post-imperial emanations) as Members of the EU, boasting little (sometimes virtually none) of recent history of

³⁸ For a meticulous analysis, see P. VAN ELSUWEGE, *From Soviet Republics to EU Member States*, Leiden-Boston: Brill-Nijhoff, 2008. See also: I. ZIEMELE, *State Continuity and Nationality: The Baltic States and Russia – Past, Present and Future as Defined by International Law*, Leiden-Boston: Brill-Nijhoff, 2005; A. DIMITROV, V. POLESHCHUK, *Kontinuitet kak osnova gosudarstvennosti i ètnopolitiki v Latvii i Èstonii*, in V. POLESHCHUK, V. STEPANOV (eds), *Ètnopolitika stran Baltii*, Moscow: Nauka, 2013.

³⁹ For an overview of the legal implications of the dissolution of Czechoslovakia, see, M. PALOUS, *Questions of Czech Citizenship*, in A. LIEBICH, D. WARNER, J. DRAGOVIC (eds), *Citizenship East and West*, London: Routledge, 1995, p. 141 *et seq.* For the general assessment of secessions in the context of the East-European eruption of state-making, see, C.R. SUNSTEIN, *Constitutionalism and Secession*, in *University of Chicago Law Review*, 1991, p. 633 *et seq.*

⁴⁰ R.W. PIOTROWICZ, *The Status of Germany in International Law: Deutschland über Deutschland?*, in *International and Comparative Law Quarterly*, 1989, p. 609 *et seq.*

⁴¹ P. LAFFONT, *Histoire de la France en Algérie*, Paris: Plon, 1979.

⁴² S.L. SHAELOU, *Market Freedoms, Fundamental Rights, and the European Public Order: Views from Cyprus*, in *Yearbook of European Law*, 2011, p. 298 *et seq.*; N. SKOUTARIS, *The status of Northern Cyprus under EU law: a comparative approach to the territorial suspension of the acquis*, in D. KOCHENOV (ed.), *EU Law of the Overseas*, cit., p. 401 *et seq.*

⁴³ F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, cit.

⁴⁴ On the role of the EU in Kosovo see: W. KOETH, *State Building without a State: The EU's Dilemma in Defining Its Relations with Kosovo*, in *European Foreign Affairs Review*, 2010, p. 227 *et seq.*; S. ROZÉE, *Order-Maintenance in Kosovo: The EU as an Increasingly Comprehensive Police Actor?*, in *European Foreign Affairs Review*, 2015, p. 97 *et seq.*; S. ECONOMIDES, J. KER-LINDSAY, *Forging EU Policy Unity from Diversity: The 'Unique Case' of the Kosovo Status Talks*, in *European Foreign Affairs Review*, 2010, p. 495 *et seq.* For Bosnia see: A. VOH BOSTIC, *The Role of the European Union's Expert Assistance in the Process of Peace-Building: The Case of Bosnia and Herzegovina*, in *European Foreign Affairs Review*, 2010, p. 209 *et seq.*; M.A. VACHUDOVA, *The Thieves of Bosnia: The Complicated Legacy of the Dayton Peace Accords*, in *Foreign Affairs*, 24 February 2014, www.foreignaffairs.com.

statehood without, the EU unquestionably emerging as an essential part of what they are as sovereign States.⁴⁵

Besides the “normality” of secessions and territorial fluctuations as testified by their commonality and omnipresence, secondly, history teaches us also the lesson of flexibility of the legal arrangements in many of these cases. This flexibility definitely includes EU law and international law: from citizenship rules,⁴⁶ to adaptations to the unique circumstances of each particular case: the Badinter commission, just as the adaptations of the pre-accession regime to accept divided Cyprus, in ephemeral control of the island,⁴⁷ are the cases in point. These lessons should be taken into account in full while interpreting the limits of the Treaties in dealing with secessions and accessions.

Now the potential permutations of statehood (secessions in particular) are coming much closer to “home”, to the “centre”, leaving behind the confines of the colonial and Eastern European periphery, often disregarded by EU legal scholars as insignificant.⁴⁸ So does the scholarly debate.⁴⁹ It would be most naïf to believe that due to the “No” camp’s victory in the last year’s Scottish referendum,⁵⁰ the question of the future relationship with the EU of an independent Scotland has disappeared from the agenda for now. The jinni is out of the bottle. Consequently, precisely how the EU should approach secessionist movements’ calls for devolution and independence is a question that is as important as ever. It is abundantly clear that the issue is definitely staying on the agenda. A number of Member States still see movements that strive for secession. Catalonia in particular springs to mind, also Flanders, possibly the Basque country, but the Scottish referendum outcome also has not silenced those advocating Scottish independence; its call for independence might very well resurge, particularly so should the major-

⁴⁵ For an illuminating analysis of the place of statehood in the international legal landscape, which is frequently misunderstood, see P.F. KJÆR, *Constitutionalism in the Global Realm: A Sociological Approach*, cit.

⁴⁶ EU law honours the Member States’ determinations, for instance, of nationality for the purposes of EU law, which implies that non-nationals of the Member States could be considered EU citizens and vice versa, some nationals could be considered non-EU citizens. The German and the UK approaches to citizenship are particular cases in point, both tolerated by EU law: Court of Justice, judgment of 20 February 2001, case C-192/99, *The Queen v. Secretary of State for the Home Department ex parte Manjit Kaur*, para. 27. For a detailed analysis of this particular issue, see, e.g., D. KOCHENOV, A. DIMITROVS, *EU Citizenship for the Latvian ‘Non-Citizens’: A Concrete Proposal*, in *Houston Journal of International Law*, 2016, p. 101 *et seq.*

⁴⁷ E. BASHESKA, D. KOCHENOV, *Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation*, in *Southeastern Europe*, 2015, p. 392 *et seq.*

⁴⁸ D. KUKOVEC, *Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo*, in D. KOCHENOV, G. DE BÜRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, Oxford: Hart Publishing, 2015, p. 319 *et seq.*

⁴⁹ See for a wide range of arguments the by S. Douglas-Scott initiated discussion on the *Verfassungsblog*: S. DOUGLAS-SCOTT, *Scotland and the EU: Eleventh hour thoughts on a contested subject*, in *Verfassungsblog*, 17 September 2014, www.verfassungsblog.de.

⁵⁰ Of the 84.6 per cent of the eligible voters, 55.3 per cent voted in favour of the Union against 44.7 per cent in favour of independence. For an analysis, see, e.g. T. MULLEN, *The Scottish Independence Referendum*, in *Journal of Law and Society*, 2014, p. 627 *et seq.*

ity of the UK population decide to vote in favor of leaving the EU in the in-out referendum promised by the Tories.⁵¹ Also plentiful other regions in Romania, Slovakia, France, Italy, Greece and elsewhere come to mind. Some Member States are noted for playing with ethnonationalism of the kin-minorities across borders,⁵² thus contributing to the richness of the palette of challenges we are speaking about.

Crucially, however, the EU's own experience of State-creation through secessions in the Balkans and a welcoming attitude to newly-emerging States in the East of Europe seems to be entirely ignored by the on-going scholarly debate, leaving room to hypocrisy accusations, no doubt. While the EU (albeit quasi-unofficially) condones Kosovo statehood⁵³ and strongly ethno-nationalist experiments elsewhere,⁵⁴ EU officials proclaim that for Scots and Catalans, when independent, there might be no future within the EU. The debate about Western European secessions is thus entirely disconnected from the facts observable in practice.⁵⁵ This perspective, devoid of historical outlook is highly problematic, to say the least.

Even though no secession and secessionist movement is the same, making it difficult to draw comparisons between Scotland, Catalonia, Kosovo and the many other examples, the question what position the EU should adopt in the secessionist context is highly relevant. The argument developed here is that as long as secessions are legally and constitutionally sound the EU should not take sides in independence debates: blackmailing the secessionist regions into remaining parts of larger States is not the way forward, antithetical to the EU's values of democracy and the Rule of Law. Inspired by those values, the EU should adopt a neutral stance on the independence referenda, respect the will of the people eligible to vote, and recognize secessions that happened in accordance with the EU's constitutional principles, just as it has consistently done in the past in the cases of many of its Member States, helping to come up with such secessionist rules itself (which is a no small matter) thus fundamentally advancing, in the words of Frank Hoffmeister, the

⁵¹ On this and the UK referendum more generally: S. DOUGLAS-SCOTT, *A UK Exit from the EU: The End of the United Kingdom or a New Constitutional Dawn?*, in *Oxford Legal Studies Research Paper*, 2015/25; M. KEATING, *The European Dimension to Scottish Constitutional Change*, in *The Political Quarterly*, 2015, p. 208 *et seq.*; Editorial Comments, *Union Membership in Times of Crisis*, in *Common Market Law Review*, 2014, p. 1 *et seq.*; N. FORWOOD, *Chinese Curses, Lawyers' Dreams, Political Nightmares and New Dawns: Interesting Times for the UK's Relationship with the EU*, in *Cambridge Yearbook of European Legal Studies*, 2012, p. 83 *et seq.*

⁵² E.g. J.-M. ARAIZA, *Good Neighbourliness as the Limit of Extra-territorial Citizenship: The Case of Hungary and Slovakia*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, cit., p. 114 *et seq.*

⁵³ Communication COM(2009) 5343 of the Commission, *Kosovo Fulfilling its European Perspective*. At the moment Kosovo is designated as a potential membership candidate. Available at www.ec.europa.eu.

⁵⁴ On the systemic ethnic discrimination in Latvia and Estonia, see, e.g. D. KOCHENOV, V. POLESCHCHUK, A. DIMITROVS, *Do Professional Linguistic Requirements Discriminate? A Legal Analysis: Estonia and Latvia in the Spotlight*, in *European Yearbook of Minority Issues*, 2013, p. 137 *et seq.*

⁵⁵ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

development of international law on the matter.⁵⁶ This being said, criticism of grotesque mockery of allowing the people to speak out in order to cover-up military aggression should obviously be frowned upon and publically condemned.⁵⁷

Would the people of the newly emerged State express the will to remain part of the EU, moreover, the EU should aspire to employ all the available political and legal tools to ensure the continuation of EU membership and protect those citizens and companies that benefit from the internal market and important EU rights in other spheres from a temporary disapplication of the *acquis*. The EU's historic ethos of inclusion,⁵⁸ integration and reaching out to the other would be betrayed would the EU frustrate the accession of States that acquired independence through secession. Moreover, it will clearly amount to a reversal of a very consistent practice to date: even Kosovo (not a State yet, as far as the EU is concerned)⁵⁹ is offered "a clear European perspective",⁶⁰ this, notwithstanding the fact, of course, that the Treaty does not provide for a possibility of the accession to the Union of any entities, which are not "European States".⁶¹ The EU *can* be very flexible (including with its own law) when it so wants. Not only famously absurd politics of veto-wielding,⁶² but also the Union's in-built aspirational idealism should help finding the proper legal solutions to do the right thing. The EU should thus try to accommodate the will of the people of the newly emerged State, thereby also protecting them against an unnecessary loss of their rights stemming from the EU legal order. Once again, we fully realize that in putting forth such claims, we contradict an important trend in European legal scholarship on the matter, which remained astonishingly incoherent, oblivious of precedent and context-driven throughout the whole run-up to the Scottish independence referendum.

⁵⁶ F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, cit.

⁵⁷ C. WALTER, *Postscript: Self-Determination, Secession, and the Crimean Crisis 2014*, in C. WALTER, A. VON UNGERN-STERMBERG, K. ABUSHOV (eds), *Self-Determination and Secession in International Law*, Oxford: Oxford University Press, 2014, p. 293 *et seq.*; J.A. GREEN, *Editorial Comment. The Annexation of Crimea: Russia, Passportisation and the Protection of Nationals Revisited*, in *Journal on the Use of Force and International Law*, 2014, p. 3 *et seq.*; E. MILANO, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, in *Questions of International Law*, 2014, p. 35 *et seq.*; A. TANCREDI, *The Russian Annexation of the Crimea: Questions Relating to the Use of Force*, in *Questions of International Law*, 2014, p. 5 *et seq.*

⁵⁸ P. SOLDATOS, G. VANDERSANDEN, *L'admission dans la CEE – Essai 'interprétation juridique'*, cit.

⁵⁹ Of all EU Member States, Spain, Romania, Greece, Cyprus, and Slovakia have not recognised Kosovo. As a consequence, the EU, when referring to Kosovo, includes a footnote specifying that "this designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence". See, for example, the Kosovo status on the European Commission – Enlargement Policy webpage, ec.europa.eu/enlargement.

⁶⁰ See sources cited in footnote 53.

⁶¹ The language of Art. 49 TEU is quite clear, notwithstanding certain scholarly disagreements on this issue, as summarized, e.g. in D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, cit.

⁶² For an array of examples, see, E. BASHESKA, D. KOCHENOV, *Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation*, cit.

III. THE PRINCIPLE OF DEMOCRACY AND ITS LIMITS

In one of the most thought-provoking contributions to the secessionist debate, Joseph Weiler has argued that the EU should not embrace those regions that one day may require statehood through secession from an EU Member State. He appears to believe the secessionist movements to be guided by a “seriously misdirected social and economic egoism, cultural and national hubris and the naked ambition of local politicians”;⁶³ a “go it alone mentality”⁶⁴ that is diametrically opposed to the normative foundations of the European Union, which is based on forward looking, reconciliatory, and inclusionary ethics. Considering that “Europe should not seem as a Nirvana for that form of irredentist Euro-tribalism which contradicts the deep values and needs of the Union”,⁶⁵ the EU must wish territories that want to secede “a Bon Voyage in their separatist destiny”.⁶⁶

Problematically, Weiler’s argument ignores the principle of self-determination and thereby one of the core values upon which the EU is founded, namely democracy. The Treaty on European Union contains numerous provisions stressing the importance of democracy. Not only is the EU, according to Art. 2 TEU, founded upon the values of respect for democracy, its functioning is based on principles of representative democracy (Art. 10 TEU), and also in its external action the EU has promised to respect and promote democratic deliberation (Art. 21 TEU). If we accept that the issue of secession must be approached from an EU legal perspective, rather than traditional international law,⁶⁷ the principle of democracy ought to be among the main principles guiding the EU as well as the Member States when determining their position with respect to seceding territories.

That democratic considerations should be central to the position the EU should take on secession is not difficult to grasp. The EU would simply disregard the values upon which it is founded and which it has promised to uphold and promote would it not take seriously the peoples’ exercise of self-determination.⁶⁸ Agreeing with Daniel Kenealy, the EU “would border on the schizophrenic” would it not allow a territory that has democratically opted for secession to become a Member State of the EU.⁶⁹ The position advocated by Weiler arguably does not take sufficiently seriously the democratic aspiration of self-

⁶³ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ For a compelling argument to this see: S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU*, cit., p. 10.

⁶⁸ See also, D. EDWARD, *EU Law and the Separation of Member States*, cit., p. 1154.

⁶⁹ D. KENEALY, *How Do You Solve a Problem like Scotland? A Proposal Regarding ‘Internal Enlargement’*, in *Journal of European Integration*, 2014, p. 585 et seq.

determination of some of the people in Europe.⁷⁰ Respect for the democratic will of the people of the seceding territory would require the EU to respect the outcome of the exercise of a democratic right and not to punish those exercising that right. Of course, secession does not need to happen via democratic means, but it would be difficult to imagine a Member State territory seceding by the use of force at the moment.

We must agree with Carlos Closa that the principle of democracy “must be understood in the light of the principles of respect for human rights, the rule of law and constitutionalism”,⁷¹ some of the other values which the EU is supposed to respect. We should expect the EU, therefore, to take into account the other values laid down in Art. 2 TEU as well when deciding whether a newly formed State formerly part of a Member State is eligible for EU membership; a secession reflecting the will of the majority but following from or resulting in the breaches of the EU’s foundational values should not result in legitimate membership claims.⁷² The implication of the latter is of course the diminished likelihood of such a secession, given that seceding from a Member State only to stay out of the Union does not seem to correspond to the programme of *any* of the credible secessionist movements in the EU at the moment. We will return to this important connection later on in this analysis.

Of particular acuteness among the principles and values to the secession process ought to comply with is the rule of law, if only because more recent rounds of enlargement have raised concerns about the protection of the rule of law within the EU.⁷³ With respect to secession, adherence to the rule of law requires that secessions happen in accordance with national constitutional requirements (presuming the latter are reasonable, of course, as opposed to the arrangements that ban any secessions talk outright

⁷⁰ For this argument see also: N. WALKER, *Scotland and the EU: Comment by NEIL WALKER*, cit.

⁷¹ C. CLOSA, *Scotland and the EU: Comment by CARLOS CLOSA*, in *Verfassungsblog*, 12 September 2014, www.verfassungsblog.de.

⁷² When combined, these criteria are similar to the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the EC in 1991 and put into practice by the Badinter Commission, in which the EU expressed the intention to recognise new States which “have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations”. This requires those new States, in addition to the principle of democracy, also to respect the rule of law, human rights, and minority rights. For an analysis see: R. RICH, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, in *European Journal of International Law*, 1993, p. 36 *et seq.*

⁷³ C. CLOSA, D. KOCHENOV, J.H.H. WEILER, *Reinforcing rule of law oversight in the European Union*, in *EUI Working Papers*, 2014/25; J.-W. MÜLLER, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, in *European Law Journal*, 2015, p. 141 *et seq.* EU’s own obvious problems both with democracy and with the Rule of Law are outside the scope of this paper. On the former see, especially, J.H.H. WEILER, *Epilogue: Living in a Glass House: Europe, Democracy and the Rule of Law*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing Rule of Law Oversight in the European Union*, cit. On the latter, D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, in *Yearbook of European Law*, 2015.

without giving the constitutional rearrangement any possibility whatsoever)⁷⁴. The rule of law is probably the main criterion by which it is possible to distinguish between the different secessionist movements, forming a continuum of acceptability, as it were. Comparisons between Scotland, Catalonia and Kosovo are as telling in this respect, as they are legally difficult: comparisons know clear limits.⁷⁵ The reasons for this are clear: while the Scottish referendum was democratically approved by both the British as well as Scottish parliament and took place fully in accordance with British constitutional requirements,⁷⁶ the same cannot be said of the Catalanian developments even notwithstanding the fact that the rigidity of the stance adopted by the Spanish government can be subject of legitimate criticism.⁷⁷ Kosovo is a seemingly different matter: while international law on self-determination is oftentimes guided by a victimhood ethos: demonstrable suffering being the best tool to amplify the claim,⁷⁸ the very fact that even among the Member States of the EU some failed to recognize its statehood, speaks for itself.

⁷⁴ In this we agree with Vicky Jackson's argument that silence about the issue of secessions is preferable to either black-letter regulation in a Constitution, or an outright prohibition. Flexibility is definitely one of the keys to stability: V. JACKSON, *Secession, Transnational Precedents and Constitutional Silences*, paper presented at the I-CON S conference, New York, 2015. See also, in the same vein, C.R. SUNSTEIN, *Constitutionalism and Secession*, cit.

⁷⁵ S. ROY, *Privileging (Some Forms of) Interdisciplinarity and Interpretation: Methods in Comparative Law*, in *International Journal of Constitutional Law*, 2014, p. 786 *et seq.* The comparison between Scotland and Kosovo was drawn by Barroso on the Andrew Marr show. For the transcript, see the reference at note 8.

⁷⁶ S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit., p. 21; M. KEATING, *Scotland and the EU: Comment by MICHAEL KEATING*, cit.

⁷⁷ See Spanish Constitutional Court, judgment no. 42/2014 of 25 March 2014; V. FERRERES COMELLA, *The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide'*, in *European Constitutional Law Review*, 2015, p. 571 *et seq.* The US Judiciary took a similar view in Supreme Court of the United States of America, *Texas v. White*, judgment of 12 April 1869; see also *Kohlhaas v. Alaska*, judgment of 17 November 2006. For a radically different approach, see the Quebec secession case. Despite the absence of Constitutional provisions allowing for secession, the Canadian Supreme Court decided that the federal government would be under an obligation to negotiate with Quebec would a clear majority of the Quebecois favour secession. Choudry and Howse see this step as one that "promotes democracy" and one which tries "restoring the legitimacy of the Canadian Constitution". S. CHOUDRY, R. HOWSE, *Constitutional Theory and the Quebec Secession Reference*, cit., pp. 163-165.

⁷⁸ On the remedial nature of statehood claims see: A.E. BUCHANAN, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford: Oxford University Press, 2004, p. 335; J. VIDMAR, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice*, Oxford: Hart Publishing, 2013, pp. 159-169; M. WELLER, *Contested Statehood: Kosovo's Struggle for Independence*, Oxford: Oxford University Press, 2008, pp. 272-274. In its advisory Opinion on Kosovo, the ICJ considered that it was not necessary to resolve the questions concerning remedial secession. International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, advisory opinion of 22 July 2010, para. 83. Victimhood seems to be acquiring a new meaning in law outside of the secessions context, subject to serious criticism: A. SAJÓ, *Victimhood and Vulnerability as Sources of Justice*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing 2015.

Adherence to the principles of democracy as well as the rule of law require that the EU recognize constitutionally sound secessions reflecting the will of the majority of the people of the seceding territory enjoying the right to vote under the law of the respective Member State – which would have been the case for Scotland would the majority have voted differently. The EU should not blackmail the people of the territory deciding on secession into remaining part of the Member State.⁷⁹ Adopting an agnostic position with regard to possible secessions would be a more acceptable stance, as Neil Walker equally concluded.⁸⁰ We would push this argument further still; simply waiting through the secession process is not enough. Should a territory acquire statehood on the basis of a democratic mandate and desires to remain part of the European integration process, the EU must approach the seceded State in a manner harmonious to its ethos, to which we will turn next, thereby also bearing in mind the interest of its own as well as the seceded States citizens, companies, and all others affected.

It goes without saying that for independent States to be able to accede to the EU, evidently more is required than their secession to be compliant with principles of democratic representation and the rule of law.⁸¹ In addition to respecting all of the EU's foundational values in Art. 2 TEU, those States would have to comply with the other Copenhagen criteria and possible further pre-accession demands.⁸² In the context of secessions good neighbourly relations will definitely play an important role (particularly in conducting relations with the State the new entity is splitting from), to name just one example.⁸³ At the Copenhagen criteria baseline, the newly-emerging State will have to demonstrate its "capacity to cope with competitive pressures and market forces within the Union" and be able "to take on the obligations of membership including adherence to the aims of political, economic and monetary union" therefore.

It cannot be taken for granted of course that new States automatically fulfil all these criteria. Even newly independent States that have been part of the EU for many years as parts of other Member States would still have to adopt new laws and transpose secondary legislation in order to be fully compliant with the requirements imposed by EU

⁷⁹ Graham Avery has expressed his discontent about the EU being used as a "weapon of mass dis-suasion". Quoted in: S. DOUGLAS-SCOTT, *How Easily Could an Independent Scotland Join the EU?*, cit., p. 9.

⁸⁰ N. WALKER, *Beyond Secession? Law in the Framing of the National Polity*, cit., and N. WALKER, *Hijacking the Debate*, cit.

⁸¹ On the detailed legal analysis of EU enlargement law, see C. HILLION, *Enlargement of the European Union: A Legal Analysis*, in A. ARNULL, D. WINCOTT (eds), *Accountability and Legitimacy in the European Union*, Oxford: Oxford University Press, 2002, p. 401 *et seq.*; D. KOCHENOV, *EU Enlargement and the Failure of Conditionality*, cit., chapters 1 and 2.

⁸² C. HILLION, *The Copenhagen Criteria and Their Progeny*, in C. HILLION (ed.), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, 2004, p. 19 *et seq.*

⁸³ P. VAN ELSUWEGE, *Good Neighbourliness as a Condition for Accession to the European Union: Finding the Balance between Law and Politics*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, cit.; E. BASHESKA, *The Good Neighbourliness Principle in EU Law*, cit.

law, to say nothing of the need to build up all the necessary organs and structures of statehood.⁸⁴ While much can be achieved by upgrading the municipal structures in place, a lot of work will still be required before a former province, however self-governing, becomes a truly operational State entity. This being said, and in complete agreement with Sionaidh Douglas-Scott, none of these are insurmountable obstacles. Considering the States, with respect, of a (much) more difficult pedigree that became full-fledged members of the Union throughout its history without solving deeply-rooted fundamental problems eroding the core of their statehood,⁸⁵ territories that secede from Member States that have been part of the EU for many years, enjoying stable institutions as well as a good economic and human rights track-record are highly unlikely to experience systemic difficulties in the course of transformation into States or fall short on EU pre-accession criteria. In the case of Scotland at least, the possible hurdles could not only be overcome, but would also be minimal.⁸⁶

IV. SECESSIONS AND THE *ETHOS* OF EUROPEAN INTEGRATION

Joseph Weiler's objections to allowing States that acquired independence through secession to join the EU are of a different kind. He agrees, in the case of Scotland at least, that there are no legal impediments for them to join would they become independent and that the adjustments necessary are of a technical nature and not too difficult to overcome.⁸⁷ His objections seem to be chiefly political, not legal, and are twofold. First of all, he fears that secession of one territory will create a domino effect among other regions pushing for secession, particularly if accession to the EU is almost automatic. More importantly, however, the secessionist movements within the Member States act in a manner fundamentally opposing the *ethos* of European integration, as Weiler sees it. It is this "Euro-tribalism", in the words of Weiler, which we should not support.⁸⁸ Perhaps one can wonder to what extent the motivations for secession should truly matter and if not the EU should be primordially concerned with the nature and character of the new State and the way the secession process was conducted. However, even if the secessionist movement's attitudes are to be taken into account, which is not unreasonable, Weiler's view of those movements is disputable.

⁸⁴ This point was accurately made by B. DE WITTE, *Scotland and the EU: Comment by BRUNO DE WITTE*, in *Verfassungsblog*, 10 September 2014, www.verfassungsblog.de.

⁸⁵ E.g. A. VON BOGDANDY, P. SONNEVEND (eds), *Constitutional Crisis in the European Constitutional Area*, Oxford: Hart Publishing, 2015; M.A. VACHUDOVA, *Why Improve EU Oversight of Rule of Law? The Two-Headed Problem of Defending Liberal Democracy and Fighting Corruption*, in C. CLOSA, D. KOCHENOV (eds), *Reinforcing the Rule of Law Oversight in the European Union*, cit.

⁸⁶ S. DOUGLAS-SCOTT, *Scotland and the EU: Eleventh hour thoughts on a contested subject*, in *Verfassungsblog*, 17 September 2014, www.verfassungsblog.de.

⁸⁷ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

⁸⁸ *Ibid.*

The EU, on this view, is premised on an ethos of forgiveness and reaching out to the other, incompatible with selfish nationalism and thus should not embrace the products of the secessionist movements that are construed upon an entirely outdated as well as demoralizing nationalist and utilitarian attitude, or at least so goes the argument.⁸⁹ Such rendering of the Union and of secessionist movements, once drained of some emotions, is deeply questionable. Even for those who are sure that the Scots who voted *Yes* are as tribalist and backward-looking as charged, it should be quite clear that the accusation does not solve the outstanding problem: how to build relations with the newly-emerging States which secede from existing EU Member States in the Europe of the 21st century.

But actually: are those voting in favor of secession truly the “Euro-tribalists” Joseph Weiler holds them for? Do they truly represent ideas that disqualify them from the membership of a Union that reaches out to the Croatians, the Irish, the Serbs and the Kosovars (among innumerable others)? And if it is the *ethos* of forgiveness and integration, as well as a forward-looking perspective that has historically characterized the EU, what should the EU’s attitude towards a secession that has come about through democratic deliberation and that respects the other of the EU’s core values be: dismissive and exclusionary or open-minded and welcoming?

One should, first of all, question Weiler’s interpretation of the kind of nationalism at stake in many of the regions that desire independence. It is far from evident that those regions are “reverting to an early 20th Century post World War I mentality”.⁹⁰ A more accurate interpretation of the matter has been provided by Will Kymlicka, whose analysis is worth quoting in full: “the assumption that minority cultural nationalisms are a defensive and xenophobic reaction to modernity is often overstated. [...] There are many cases of minority nationalisms around the world today which are not all that different from French and American revolutionary nationalism, in the sense that they too are forward-looking political movements for the creation of a society of free and equal citizens. They seek to create a democratic society, defined and united by a common language and sense of history. I think this is what most Québécois nationalists seek, as well as most Catalan, Scottish, and Flemish nationalists. They are not trying to avoid modernity; they are precisely trying to create a modern democratic society”.⁹¹

Regardless of whether we agree with or (mis)understand the aspirations and motivations of those seeking secessions, we must be careful not to dismiss every instance of minority nationalism as belonging to the kind of mindset that is concerned with “national purità” and resulted in “ethnic cleansing”.⁹² But even if one sees secession as a

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ W. KYMLICKA, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, Oxford: Oxford University Press, 2001, pp. 245-246.

⁹² J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

historical mistake, representing an outdated nationalistic perspective that runs counter to what the EU has aspired to achieve, the epitome of forgiveness would be the one that accepts the new State despite the people's *mistaken* decision to secede. What could be more in line with the EU's historical *ethos* (grand colonization projects aside) than the EU and in particular the Member State from which the territory has seceded to say: despite our disagreements about what should have happened, despite our past and present tensions and conflicts, we welcome you to the European family and recognize you as an independent Member State with which we share a common destiny? Wishing seceding States "a Bon Voyage in their separatist destiny" rests upon a profoundly disputable reading of the European *ethos*.⁹³

It might be "ironic if the prospect of Membership in the Union ended up providing an incentive for the ethos of political integration",⁹⁴ Weiler writes, but it would be no less ironic if the EU, which is the reply to absolute sovereignty ideologies, the *tamer* of States and the promotor of liberal, inclusive and tolerant nationhood,⁹⁵ would exclude those who share the most profound European values, pushing them to the fringes of European society, and forcing them to be the sovereign entities the EU has always aspired to overcome. Contrary to what Weiler assumes, there is no indication at all that those who support secession do not share the *ethos* of European integration. To the opposite, those who strive for secession might very well be more supportive of the European project – and what this project stands for – than some of the current Member States. Moreover, the population of territories with secessionist movements, such as Scotland, seem more inclusive and respectful towards the other than some of the Member States that joined the EU in recent years, which at times have a highly dubious track-record concerning the protection of minorities, the rule of law and human rights.⁹⁶ Ironically, the EU itself is guilty as charged of bringing minority protection on the ideological altar of the internal market,⁹⁷ as well as promoting quite a one-sided vision of progress,⁹⁸ where depoliticisation is frequently presented as an achievement⁹⁹

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ W. KYMLICKA, *Liberal Nationalism and Cosmopolitan Justice*, in S. BENHABIB, *Another Cosmopolitanism*, Oxford: Oxford University Press, 2006, p. 128; N. MACCORMICK, *Beyond the Sovereign State*, in *Modern Law Review*, 1993, p. 1 *et seq.*

⁹⁶ On problematic standards of minority protection in some Member States see: W. KYMLICKA, *National Minorities in Postcommunist Europe: The Role of International Norms and European Integration*, in Z. BARANY, R.G. MOSER (eds), *Ethnic Politics after Communism*, Ithaca: Cornell University Press, 2005; G.N. TOGGENBURG (ed.), *Minority Protection in the Enlarged European Union: The Way Forward*, Budapest: Open Society Institute, 2004.

⁹⁷ D. KOCHENOV, *The European Union's Troublesome Minority Protection: A Bird's-Eye View*, in J. BOULDEN, W. KYMLICKA (eds), *International Approaches to Governing Ethnic Diversity*, Oxford: Oxford University Press, 2015, p. 79 *et seq.*

⁹⁸ G. PEEBLES, 'A Very Eden of the Innate Rights of Man? A Marxist Look at the European Union Treaties and Case Law', in *Law and Social Inquiry*, 1998, p. 581 *et seq.*; M. BARTL, *Internal Market Rationality*,

and the technicalities, like “autonomy” trump values, such as the protection of human rights or the rule of law,¹⁰⁰ which the EU is powerless to enforce in the Member States deviating from the proclaimed ideals.¹⁰¹ Upon such a (radical) reading, (potential) Member States with a more questionable reputation, with all respect, will definitely be more at home *in Europe* than the Scots. Yet, the EU should be too good even to ask the Scots what they want after their betrayal of the UK, Joseph Weiler is telling us.

There is no denying of the fact of course that the secessionist regions’ interest in membership of the EU is to a great degree driven by utilitarian considerations.¹⁰² In this sense there can be no dispute about the fact that secessions become a much more attractive option due to the presence of the EU. Indeed, as Eric Hobsbawm explained in detail, the EU added the viability component missing from the small States secessionist claims throughout the history of development of nationalism.¹⁰³ In this sense we see a reversal in the vector of nationalism in which the presence of the EU definitely plays a role, even if this role is not necessarily decisive. While classical nationalism of the 19th century aspired for *unification*, this is not any more the case partly due to the fact that the structure of global economy, coupled with the rise of regional organisations, like the EU, make much smaller States viable projects, which can be effectively sustained through time. So the internal market, EU citizenship, and the principle of non-discrimination allow the seceded States, would they be allowed to join the EU, to enjoy many of the benefits of scale they could enjoy would they have remained part of another Member State. Simultaneously, the structures making smaller States viable also limit the *sovereignty* of such States, imposing serious limitations on the political agendas which they can actually pursue. It is widely assumed (and might be correct)¹⁰⁴ that it is much more difficult to fail as a State, both economically and in terms of democratic and Rule of Law-backsliding, once in the EU. Indeed, this was arguably one of the main arguments for joining the Union for the States from behind the iron curtain: a safety-valve

Private Law and the Direction of the Union: Resuscitating the Market as the Object of the Political, in *European Law Journal*, 2015, p. 572 *et seq.* See, also, for a broader account, P. AGHA, *The Empire of Principle*, in J. PRIBÁŇ (ed.), *The Self-Constitution of Europe*, Farnham: Ashgate, 2015; A. WILLIAMS, *Taking Values Seriously: Towards a Philosophy of EU Law*, in *Oxford Journal of Legal Studies*, 2009, p. 549.

⁹⁹ A.J. MENÉNDEZ, *Whose Justice? Which Europe?*, in D. KOCHENOV, G. DE BÚRCA, A. WILLIAMS (eds), *Europe’s Justice Deficit?*, cit., p. 137.

¹⁰⁰ P. ECKHOUT, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?*, in *Fordham International Law Journal*, 2015, p. 955.

¹⁰¹ D. KOCHENOV, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, cit.

¹⁰² SNP, in Scotland, switched from an anti-European to a pro-European party, fully realising Europe’s potential for the (new) small States. Cf.: J. SHAW, *Scotland: 40 Years of EU Membership*, in *Journal of Contemporary European Research*, 2012, p. 547.

¹⁰³ E. HOBBSAWM, *Some Reflections on ‘The Break-up of Britain’*, in *New Left Review*, 1977, p. 105 *et seq.*

¹⁰⁴ But see, for a more sophisticated perspective, A.J. MENÉNDEZ, *The Existential Crisis of the European Union*, in *German Law Journal*, 2013, p. 453 *et seq.*

against themselves¹⁰⁵ and the question is open whether Scotland or Catalonia (unlike, say, Hungary or Poland) will actually need to see such a safety-valve to guarantee their democracy and development in action. In any event, blaming the EU for making secessions from the Member States premised upon joining the Union easier would be an absurd move: it is engrained in the EU's very nature to challenge the sovereigntist *status quo* (let us not forget that the EU's strong point and its main deficiency, the humiliation of the State, is its main constitutional tactic).¹⁰⁶ Simultaneously also empowering those seeking secession and, afterwards, accession, seems to be a natural by-product of what the Union is about. It would be unfair also to exclude newly emerging States from EU membership for their utilitarian motives, for the simple reason that it is difficult to understand how that differentiates those regions from current Member States and, even trickier perhaps, why exactly joining the EU should not be a utilitarian choice. One would be tempted to share Weiler's concern for the "what's in it for us"¹⁰⁷ mentality that currently plagues the EU, but it is difficult to understand how being as good/bad as the current Member States is a criterion by which we can exclude seceded States seeking accession. Instead, a seceding State's eligibility for EU membership should be examined according to the same criteria we used for other enlargements.

Most importantly, utilitarianism alone cannot fully account for secessionist movements, if only because secession might be entirely unwise from a utilitarian perspective. Many of those favoring secession must surely also be regarded as having different and deeply held convictions about the collective future of their nation. One may dismiss these feelings of nationalism as merely imagined as they certainly are,¹⁰⁸ but that does not change the profound social reality within many Member States.¹⁰⁹ And while the EU's historic *ethos* has been to tame feelings of nationalism, it is undisputable that it was not designed to fully overcome national sentiments, thereby destroying the Member States, let alone to recreate problematic *quasi*-nationalisms at the supranational level.¹¹⁰ This is perfectly demonstrated by EU citizenship's derivative nature, *inter alia*, which Weiler also stresses in his contribution.¹¹¹ If the people of a current Member State's territory secede following a constitutionally legitimated expression of collective autonomy but meanwhile unequivocally indicate, through a request for EU member-

¹⁰⁵ W. SADURSKI, *Constitutionalism and the Enlargement of Europe*, Oxford: Oxford University Press, 2012.

¹⁰⁶ G. DAVIES, *The Humiliation of the State as a Constitutional Tactic*, in F. AMTENBRINK, P.A.J. VAN DEN BERG (eds), *The Constitutional Integrity of the European Union*, The Hague: Asser Press, 2010, p. 147.

¹⁰⁷ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

¹⁰⁸ B. ANDERSON, *Imagined Communities*, London-New York: Verso, 1991.

¹⁰⁹ D. MILLER, *On Nationality*, Oxford: Oxford University Press, 2000.

¹¹⁰ Pace Habermas: J. LACROIX, *Does Europe Need Common Values? Habermas vs Habermas*, in *European Journal of Political Theory*, 2008, p. 141 *et seq.* See also D. KOSTAKOPOULOU, *The Future Governance of Citizenship*, Cambridge: Cambridge University Press, 2008, Chapter 3.

¹¹¹ J.H.H. WEILER, *Scotland and the EU: a Comment by JOSEPH H.H. WEILER*, cit.

ship, that they want to tame their feelings of nationalism, the EU would betray its *ethos* as well as its foundational values would it frustrate or reject such a request.

Instead of blackmailing secessionist regions into remaining part of their State, the EU should adopt a more neutral approach, therefore, which respects the exercise and outcome of the democratic process of collective self-determination. This requires the EU to distance itself from the national debate and respect and endorse the outcome of the vote on secession. Would the majority of the people of a region prefer independence, the EU must approach the seceded territory with an open mind, finding the best solution for all parties involved.

V. HOW TO APPROACH A SECEDED TERRITORY

Truly respecting the democratic right of the people of the seceded State to determine their collective future also requires acknowledging that the seceded territory should be free to decide what kind of relationship to the EU it prefers. To claim that newly-independent States formerly forming part of a Member States of the EU and thus being subjected to the EU legal order should also embrace the EU in the future because their citizens cannot lose their EU citizenship rights is not only problematic from a legal point of view,¹¹² particularly given the derivative nature of EU citizenship, but also violates democratic principles. It should be up for the people of the newly-formed State to decide whether they want to apply for EU membership, or whether they prefer a different kind of relationship with the EU.¹¹³ Would the people of the seceding State be allowed to retain the citizenship of their previous State, which is clearly a preferred solution,¹¹⁴ this might not be an issue at all. Where this is not the case, however, the consequence of the decision not to apply for EU membership will be the loss of the status as EU citizen upon the date of secession.¹¹⁵ It is difficult to see how individuals who are negatively affected by this could prevent this from happening would the majority of their people decide to leave the EU.

¹¹² P. ATHANASSIOU, S. LAULHÉ SHAELOU, *EU Accession from Within? – An Introduction*, in *Yearbook of European Law*, 2014, p. 1 *et seq.* See also D. KENEALY, S. MACLENNAN, *Sincere Cooperation, Respect for Democracy and EU Citizenship: Sufficient to Guarantee Scotland's Future in the European Union?*, cit.

¹¹³ On the role that EU citizenship should (and can) play in the context of secessions, see, P. ATHANASSIOU, S. LAULHÉ SHAELOU, *EU Citizenship and Its Relevance for EU Exit and Secession*, in D. KOCHENOV (ed.), *EU Citizenship and Federalism: The Role of Rights*, cit.

¹¹⁴ In the case of Scotland, it has been suggested for example that it could have been possible for the Scottish people to retain their British citizenship. S. DOUGLAS-SCOTT, *Scotland and the EU: Eleventh hour thoughts on a contested subject*, cit.

¹¹⁵ Unless some alternative status of belonging would be granted to the citizens of the seceding territory by their former motherland, which would be connected with EU citizenship, which is an obvious possibility in EU law. For a similar possibility applied to the Latvian citizenship context, plagued by ethnic discrimination, which could be remedied through EU law, see D. KOCHENOV, A. DIMITROVS, *EU Citizenship for the Latvian "Non-Citizens": A Concrete Proposal*, cit.

We can all see though that a decision of a newly-formed State that used to be part of an EU Member State not to apply for EU membership is not a really attractive one. This would be the kind of tribalism we should deplore. Furthermore, it would severely undermine the interests of the companies established in the seceding State, as well as the workers, students, as well as other EU citizens residing there. Of course, also the citizens of the seceding State residing within an EU Member State would pay the price of their State not becoming an EU Member State. This being said, the problem is largely ephemeral, of course, since, presuming there is minimal good will, an agreement between the EU and the Member States and the newly-independent State can be negotiated with an aim to minimize the negative effects of secession for EU citizens in the seceding State.

Preventing any negative consequences of secession from emerging is of course the EU's responsibility as well. Rather than slamming the door to EU membership in the face of the seceded State, the EU must be open and constructive. Of course, to repeat what was said throughout this article, this requires that the decision to secede was legally and constitutionally sound, was taken through democratic means, and that the State fulfils the other membership criteria. If this is the case, the EU and the Member States should be open to the applicant State, not only because it should want to protect the acquired rights of business and citizens, but also because the EU's historic *ethos* of inclusion, integration, and accepting the other warrants an open and welcoming approach towards States that acquired independence through secession. Even more, the EU should be ready to tame its own Member States unwilling to engage in constructive dialogue (a negative example of such State is constantly provided by the Greek behavior in its neighbourhood which is far from constructive and has totally undermined)¹¹⁶ *inter alia*, the EU's and the UN's attempts to solve the Cyprus issue¹¹⁷ as well as to stabilize the situation in Macedonia,¹¹⁸ which is a constant target of the illegal pressure by Greece.¹¹⁹ It is not unlikely that some of the Member States will be ready to misbehave in a similar way, making the EU as well as their peers and the newly-independent State to pay a high price. A strong presumption concerning the nature of such behavior as

¹¹⁶ E. BASHESKA, D. KOCHENOV, *Thanking the Greeks: The Crisis of the Rule of Law in EU Enlargement Regulation*, cit.

¹¹⁷ F. HOFFMEISTER, *The Contribution of EU Practice to International Law*, cit.

¹¹⁸ E. BASHESKA, *(Mis-)application of the Good Neighbourliness Principle in International and EU Law: The Case of the Republic of Macedonia*, in D. KOCHENOV, E. BASHESKA (eds), *Good Neighbourliness in the European Legal Context*, cit.

¹¹⁹ International Court of Justice, *Application of the Interim Accord of 13 September 1995*, judgment of 5 December 2011. For an analysis see: F. FONTANELLI, E. BJORGE, *International Court of Justice, Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v Greece) Judgment of 5 December 2011*, in *International and Comparative Law Quarterly*, 2013, p. 775 *et seq.*; F. MESSINEO, *Maps of Ephemeral Empires: The ICJ and the Macedonian Names Dispute*, in *Cambridge Journal of International and Comparative Law*, 2013, p. 169 *et seq.*

breaching the duty of loyalty, should be adopted by the Commission, taking all the necessary steps to ensure that Greek-style tradition of ignoring international law and undermining dialogue does not serve as an example of solving outstanding issues in Europe involving the territories which have already been within the scope of EU law.

There are two legal routes through which seceding States formerly belonging to an EU Member State can be welcomed to the EU. The first and at first sight most obvious is the normal Treaty accession procedure in Art. 49 TEU.¹²⁰ During the discussions in the lead-up to the Scottish referendum on independence a second option was suggested: namely, Art. 48 TEU, which allows for internal enlargement and immediate membership of the seceding State through the revision of the Treaties. The latter was put forward as an option because the use of Art. 48 TEU would allow for a “seamless transition”,¹²¹ allowing the seceding State to become an EU member on the date of secession thereby preventing the seceding State to have to leave the EU before being able to join again. The Art. 49 TEU accession route would force the seceding State to temporarily leave. After the accession Treaty has been signed by the independent State, it must, after all, still be ratified by all Member States.¹²²

To ensure the uninterrupted continuity of rights and obligations within the context of the internal market and the area of freedom security and justice, the Art. 48, TEU route clearly appears to be the preferable option. It would allow for internal enlargement and thus prevent that a territory has to leave the EU, even for a very brief period. To dismiss the possibility of the Art. 48 TEU procedure out of hand and suggest that a seceding territory can only apply upon independence, as done by former Commission President Barroso,¹²³ is unhelpful and smells of particularly cautious and traditional legal advice, which is all too handy to ensure that the Union subtly takes sides in the secession debate by taking the position of the government opposing secession.

Instead, it would clearly be preferable to examine the different options available with an open mind. In all likelihood we would be required then to acknowledge that both routes provide us with political and practical difficulties. Both Treaty amendment and accession require the uniform consent of all Member States. Considering the number of Member States with internal struggles for secession, it is far from certain that all Member States will ratify the revision or accession Treaty without further ado. Whereas Art. 48 TEU might allow for a seamless transition, it is thus certainly not guaranteed that

¹²⁰ For an analysis, see, M. CHAMON, G. VAN DER LOO, *The Temporal Paradox of Regions in the EU Seeking Independence: Contraction and Fragmentation versus Widening and Deepening?*, in *European Law Journal*, 2014, p. 613 *et seq.*

¹²¹ The term seamless transition was used by the Scottish government to describe internal enlargement process through the use of Article 48 TEU. See the document by the Scottish Government, *Scotland's Future: Your Guide to an Independent Scotland*, in *Scottish Government White Paper*, 2013, p. 220.

¹²² B. DE WITTE, *Scotland and the EU: Comment by BRUNO DE WITTE*, cit.

¹²³ Barroso's comments, cit.

it will create “a smooth transition”.¹²⁴ Additionally, the initiation of the Treaty revision procedure might be used by other Member States as a pretext to try to renegotiate their own membership within the EU. Without the willingness of the Member States to act in a prudential manner, ensuring that secession does not result in a temporal gap of legal protection for citizens, companies, and others benefitting from the internal market, Art. 48 TEU might very well become a more lengthy process than Art. 49 TEU.¹²⁵

While Art. 48 TEU seems the preferable procedure, depending on the political context the Treaty revision procedure might still not guarantee uninterrupted membership for the seceding territory. During the ongoing process of negotiations, those who risk losing the rights acquired during the EU membership of the seceding territory should be protected against the unduly and temporary termination of rights during the transitional period of non-membership. Even if the negotiations for full membership turn out to last longer, no one should aim at concocting a temporary legal limbo during which important rights are suddenly temporarily terminated. Even in the case of legal or political disagreement about accession, there can be no moral excuse for such a situation to happen (unless one feels like punishing the Euro-tribalists, of course). In case a period of non-membership is inevitable, measures will have to be adopted for this period to protect those with acquired rights, as Christophe Hillion and Nick Barber have rightly suggested.¹²⁶ The preferable option, however, still remains uninterrupted membership.

VI. CONCLUSION

While the surge of independence movements within several of the EU's Member States raises a set of intricate political and legal questions, the impression that these movements represent something unseen before must be rejected. Mutations of statehood, through secession or by other means, are of all times. This time, however, those pushing for independence are not the people outside the geographical boundaries of Europe, they are European citizens at the heart of the continent. Coming closer to home, the legal and political issues raised by those developments need to be responded to adequately by the EU.

¹²⁴ B. DE WITTE, *Scotland and the EU: Comment by BRUNO DE WITTE*, cit. See also: J. MURKENS, *Scotland and the EU: Comment by JO MURKENS*, in *Verfassungsblog*, 8 September 2014, www.verfassungsblog.de.

¹²⁵ These were the remarks made by Kenneth Armstrong in his evidence to the House of Commons on the Scottish independence referendum. For the transcript see The House of Commons Oral Evidence Taken Before the Scottish Affairs Committee, *The Referendum on Separation for Scotland*, 15 January 2014, www.publications.parliament.uk. See also: J. MURKENS, *Scotland and the EU: Comment by JO MURKENS*, cit.

¹²⁶ C. HILLION, *Scotland and the EU: Comment by CHRISTOPHE HILLION*, in *Verfassungsblog*, 15 September 2014, www.verfassungsblog.de. N. BARBER, *After the Vote*, in *Blog of the UK Constitutional Law Association*, 14 January 2014, www.ukconstitutionallaw.org.

The position adopted by several of the EU officials, unfortunately, suffers from some blatant shortcomings. Rather than adhering to the principle of democracy, which would have warranted a more agnostic stance with respect to possible secessions exercised through legally sound democratic means, the EU has taken a more interventionist perspective warning those territories that their future as members of the European family is far from certain would they opt for independence, thereby making secession a less attractive option. This view, espoused by Weiler as well, though in an even more extreme fashion, would not only leave ample room for hypocrisy accusations, bearing in mind the States of more dubious pedigree that have been allowed to join or are on the waiting list, but also opposes the values upon which the EU is founded. Adherence to the principles of democracy as well as the rule of law require the EU to recognize legally and constitutionally sound and democratically legitimated secessions, provided that the other membership criteria are fulfilled of course.

Not only would any other decision run counter to the EU's foundational values, banning the seceded territory from the European family would also betray the ethos of European integration. This ethos, which rests upon inclusion, integration, and the embrace of the other, is not served by removing or frustrating the prospect of EU membership; rather, and contra to what Weiler assumes, embracing those who share core European values, despite past and present disagreements, thereby taming the nationalist sentiments within those territories, is the position that is premised upon a firm belief in the EU's historic ethos.

Respecting the democratic right of the people of the seceded State equally requires that the seceded territory is left free to determine what sort of relationship to the EU it prefers. The EU ought to adopt an open and welcoming approach, should the seceded State opt for EU membership. The EU should use all means to prevent that the accession process is frustrated. Such an approach also requires the EU to try to prevent the loss of rights of those presently covered by EU law. Whether through the Art. 48 TEU route or by temporarily protecting those with acquired rights by other means until the seceded territory becomes an official EU Member State, the road to membership should be as smooth as possible. Rather than punishing the people of a seceded territory for the exercise of their democratic right to self-determination, a European Union that pretends to take seriously its foundational values and historic ethos should be expected to welcome those States to the European family.